

BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation)	
Against:)	No. AC-95-16
)	
KENNETH JOEL LEIB)	OAH No. N-9604043
4707 Medford Street)	
Fair Oaks, CA 95628)	
Certificate Number 20467)	
)	
Respondent.)	
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PROPOSED DECISION

On June 10, 1996, in Sacramento, California, William O. Hoover, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Luana L. Martilla, Deputy Attorney General represented the complainant Board of Accountancy ("Board").

Kenneth Joel Leib ("respondent") appeared in propria persona.

Complainant moved to amend paragraph 9 of the Accusation by replacing the reference to "paragraphs 8 and 9" with "paragraphs 7 and 8". Without objection the motion was granted.

Evidence was received, the record was closed and the matter was submitted.

FINDINGS OF FACT

I

Carol Sigmann, Executive Officer of the Board of Accountancy, Department of Consumer Affairs, State of California, made and filed this Accusation against respondent in her official capacity.

II

On August 2, 1974, the Board issued Certified Public Accountant certificate number 20467 to respondent. The certificate is in full force and effect and will expire, subject to renewal, on November 1, 1996.

III

On March 18, 1993, in the Municipal Court of the Southeast/San Antonio Judicial District for the County of Los Angeles, State of California, respondent entered a plea of nolo contendere to a felony violation of Penal Code section 504 (embezzlement) and admitted the special allegation of violation of Penal Code section 12022.6(a) (taking, damaging or destroying property in excess of \$25,000).

Factually, during the period January 1, 1990 and August 31, 1992, while employed by C.A.R Truck and Trailer Repair (CAR) as a certified public accountant, respondent unlawfully appropriated from CAR, for his own purposes, at least \$63,000 entrusted to him. The funds were sales tax monies intended for remittance to the State Board of Equalization.

As a result of his conviction respondent was sentenced on May 20, 1993, to state prison for 2 years 4 months. However, the sentence was stayed for a period of 5 years during which the respondent would be on probation. Respondent was given credit for time served for 1 day in jail and ordered to pay restitution in an amount to be determined.

Given these circumstances, there can be little question that respondent's felony conviction for embezzlement of a client's funds is substantially related to the qualifications, functions and duties of a certified public accountant.

IV

Respondent paid \$40,000 to the victim prior to being placed on probation. These funds were supplied by other clients of respondent. At a later hearing on the issue of restitution, the court determined the balance owed to victim CAR was \$52,232 and recommended the probation department collect at least 5% of respondent's gross income. Other than the lump sum paid when respondent was placed on probation the total paid via monthly basis to the present is approximately \$1,500.

V

Respondent was in fiduciary relationship with CAR. As CAR's certified public accountant respondent's duties included determining the amount of sales tax owed to the state and

ensuring its timely payment. Initially, respondent would prepare the tax return and give it to CAR which would then sign and return the document to respondent with a check for the amount owed. After a period of time CAR became suspicious when it did not receive copies of the tax returns and requested an audit by the Board of Equalization in the latter part of 1992. The audit revealed no record of tax payments for approximately 1 1/2 years and concluded that CAR owed approximately \$113,000 in unpaid taxes, penalties and interest. Respondent's conduct was dishonest and a breach of his fiduciary duty to CAR.

VI

The Board of Equalization demanded satisfaction of the tax liability and CAR's attempts to meet these demands caused the business to nearly close in December 1994. CAR was unable to pay its bills, it had to purchase equipment on a cash basis only and ultimately had to take out a loan in order to help pay the tax liability. CAR's credit rating was adversely affected as a direct result of respondent's actions.

VII

Respondent did not contest any of the facts presented at the hearing and admitted each and every allegation as contained in the Accusation.

VIII

Respondent became involved in the real estate market in Los Angeles at a time when market demand (and profits) were high. Respondent would buy inexpensive homes, remodel them and then sell the homes for a substantial profit. When the housing market "dried up" respondent had four unsold homes in which he had invested a large amount of money and he began embezzling CAR funds in order to "stay afloat". The homes were eventually sold at a financial loss to respondent.

IX

Respondent currently holds himself out as a Certified Public Accountant (CPA) and prepares tax returns and financial statements. He does not handle any funds nor does he write any checks. His current monthly income is approximately \$2,100.

Per a recent probation report (March 1996), for the six months preceding March 6, 1996, respondent's monthly income has fluctuated between \$2,800 and \$5,000.

X

Other than the lump sum payment paid in 1993, as of July 25, 1995, respondent paid a total of \$1,250 towards restitution. As of February 15, 1996, respondent paid a total of \$1,500. He paid \$48 approximately three weeks prior to this hearing.

XI

No evidence was presented that any violation of probation has been filed against respondent or that he has engaged in any professional misconduct since his conviction in March 1993.

XII

AGGRAVATION

A. The conduct was knowingly committed with premeditation as established by Findings III, V, VII and VIII.

B. The conduct involved an egregious breach of respondent's fiduciary duty that damaged his client's credit and nearly resulted in the closure of its business as established by Findings III, V, and VI.

C. The financial loss was significant and compounded by the fact that the client was assessed penalties and interest by the Board of Equalization as established by Findings III and V.

D. Respondent misappropriated approximately \$63,000 from CAR which moneys had been entrusted to respondent for payment of sales tax to the Board of Equalization as established by Findings III, V, VII, and VIII.

E. The conduct occurred over a period of 1 1/2 years or more while respondent was the accountant for CAR as established by Finding V.

XIII

MITIGATION

A. No evidence was presented that respondent has engaged in any other act of unprofessional misconduct since the conduct giving rise to this hearing as established by Finding XI.

B. Respondent has admitted his wrongdoing and taken steps to prevent a recurrence as established by Findings VII and IX.

XIV

The evidence established the Board's investigative costs through July 31, 1994, were \$1,530.24.

DETERMINATION OF ISSUES

I

Business and Professions Code section 5100 provides in pertinent part that the Board may revoke, suspend or refuse to renew any certificate granted by the Board for unprofessional conduct, which includes, but is not limited to, one or any combination of the following subsections:

(a) Conviction of any crime substantially related to the qualifications, functions and duties of a certified public accountant.

....

(c) Dishonesty, fraud, or gross negligence in the practice of public accountancy or in the performance of the bookkeeping operations described in Section 5052.

....

(h) Fiscal dishonesty or breach of fiduciary responsibility of any kind.

....

(j) Embezzlement, theft, misappropriation of funds of property, or obtaining money, property, or other valuable consideration by fraudulent means of false pretenses.

II

Cause for discipline pursuant to Business and Professions Code section 5100(a) has been demonstrated by clear and convincing evidence based on Findings III and VII.

III

Cause for discipline pursuant to Business and Professions Code section 5100(c) has been demonstrated by clear and convincing evidence based on Findings III, V, VII and VIII.

IV

Cause for discipline pursuant to Business and Professions Code section 5100(h) has been demonstrated by clear and convincing evidence based on Findings III, V, VII and VIII.

V

Cause for discipline pursuant to Business and Professions Code section 5100(j) has been demonstrated by clear and convincing evidence based on Findings III, V, VII and VIII.

VI

REHABILITATION

A. While several years have elapsed since respondent's convicted for embezzlement and there was no evidence of a recurrence or other unprofessional misconduct, the conduct was egregious and caused serious harm to CAR. Further, respondent is still on probation and has only minimally complied with the court's restitution order. Respondent has changed his mode of practice to prevent recurrence but that is insubstantial evidence of rehabilitation.

B. The factors in aggravation (Finding XII- A-E) clearly outweigh the factors in mitigation (Finding XIII-A & B).

VII

COSTS RECOVERY

Pursuant to Business and Professions Code section 5107 recovery of investigative costs is permitted where a licensee has been determined to have violated Business and Professions Code section 5100 subsections (a), (c), (h) and (j). Such determinations have been made and, therefore, in light of Finding XIV the awarding of such costs is appropriate in the amount requested.

However, as a primary purpose of a regulatory agency is protection of the public, restitution to the victim is of a higher order of precedence than recovery by the Board of its costs. In that regard, the Board shall stay its collection of the costs awarded for a period of four (4) months after the date the Board's decision becomes final. If respondent provides proof of payment to victim CAR of no less than an amount equal to the costs awarded (\$1530.24) within that period of time, the Board's stay shall become permanent.

Any payment(s) made shall be in addition to any payments required by the terms and conditions of respondent's

probation and no set offs shall be permitted. Respondent bears the responsibility of verifying the separate payments. Should respondent fail to provide proof of payment in full of \$1530.24 to victim CAR within the time provided, the Board's stay shall be lifted and the cost award shall become immediately due and payable.

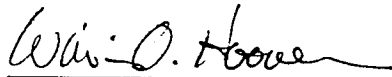
ORDER

Certified Public Accountant certificate number 20467 issued to respondent Kenneth Joel Leib is revoked pursuant to Determination of Issues II, III, IV and V separately and for all of them and in consideration of Determination of Issues VI-A & B.

Respondent shall pay investigative costs in the amount of \$1530.24 to the Board. Collection shall be stayed for a period of four (4) months after the date the Board's decision becomes final. It shall then become immediately due and payable if respondent has not complied with Determination of Issues VII.

Reinstatement of respondent's license shall be conditioned on proof of satisfaction of the restitution owed to victim CAR and payment of the agency's costs of investigation, unless permanently stayed or waived.

Dated: 7/3/96



WILLIAM O. HOOVER
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation)	
Against:)	No. AC-95-16
)	
KENNETH JOEL LEIB)	OAH No. N-9604043
4707 Medford Street)	
Fair Oaks, CA 95628)	
Certificate Number 20467)	
)	
Respondent.)	
_____)	

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Accountancy as its Decision in the above-entitled matter.

This Decision shall become effective on September 7, 1996.

IT IS SO ORDERED August 7, 1996.

BOARD OF ACCOUNTANCY



President

1 DANIEL E. LUNGREN, Attorney General
of the State of California
2 JOEL S. PRIMES
Supervising Deputy Attorney General
3 LUANA L. MARTILLA, State Bar No. 69158
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4 P.O. Box 944255
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5 Telephone: (916) 324-5341

6 Attorneys for Complainant

7
8 BEFORE THE
BOARD OF ACCOUNTANCY
9 DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA
10

11 In the Matter of the Accusation Against:)	No. AC-95-16
)	
12 KENNETH JOEL LEIB)	<u>ACCUSATION</u>
4707 Medford Street)	
13 Fair Oaks, CA 95628)	
Certificate Number 20467)	
)	
14 Respondent.)	
)	

15
16 Complainant Carol Sigmann (hereinafter "complainant") alleges as follows:

17 1. Complainant is the Executive Officer of the Board of Accountancy,
18 Department of Consumer Affairs, State of California (hereinafter "Board"). Complainant
19 makes and files the instant accusation solely in her official capacity with the Board and in no
20 other capacity.

21 LICENSE INFORMATION

22 2. On or about August 2, 1974, the Board issued to Kenneth Joel Leib
23 (hereinafter "respondent") Certified Public Accountant certificate number 20467. Said
24 certificate is currently in full force and effect and expires subject to renewal on November 1,
25 1996.

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1 Court of the Southeast/San Antonio Judicial District, County of Los Angeles, State of
2 California, in Case Number VA017426, respondent entered a plea of nolo contendere to a
3 felony violation of Penal Code section 504 (embezzlement by public or private officer) and
4 admitted special allegations within the meaning of Penal Code section 12022.6(a)
5 (appropriation of property of a value exceeding \$25,000).

6 7. The circumstances of this criminal conviction are as follows:
7 Between the approximate dates of January 1, 1990 and August 31, 1992, while acting as a
8 certified public accountant for CAR Truck and Trailer Repair, respondent collected
9 approximately \$64,000 from the principals of CAR Truck and Trailer Repair for transmittal
10 to the Board of Equalization, but failed to transmit the monies to the Board of Equalization.

11 8. The respondent was a trusted certified public accountant and was
12 engaged to remit sales tax money received from CAR to the Board of Equalization. The
13 respondent was fiscally dishonest and breached his fiduciary duty by not remitting the CAR's
14 sales tax monies to the Board of Equalization. The respondent used CAR's sales tax monies
15 for personal use. The respondent did not make full restitution to CAR for the money not
16 remitted to the Board of Equalization.

17 9. The conduct set out in paragraphs 8 and 9, above, is substantially
18 related to the qualifications, functions or duties of a certified public accountant in that it
19 involves fiscal dishonesty and breach of fiduciary responsibility. (Title 16, California Code
20 of Regulations, section 99.)

21 WHEREFORE, complainant prays that an administrative hearing be convened,
22 and that following the hearing, a decision and order be issued.

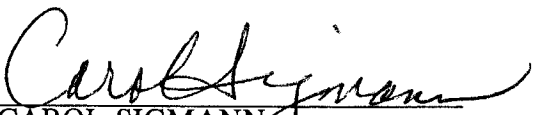
- 23 1. Suspending or revoking the certificate number 20467 of respondent;
24 2. Ordering recovery by the Board of all reasonable costs of investigation and
25 prosecution of the case pursuant to section 5107; and

26 / / /

27 / / /

1 3. Taking such other and further action as may be deemed proper and
2 appropriate.

3
4 DATED: February 13, 1996


CAROL SIGMANN
Executive Officer
Board of Accountancy, DCA
State of California

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